Alan Harris (SBN 146079)
David S. Harris (SBN 215224)
David Zelenski (SBN 231768)
HARRIS & RUBLE
5455 Wilshire Boulevard, Suite 1800
Los Angeles, California 90069
Telephone: (323) 931-3777
Facsimile: (323) 931-3366

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VIRGINIA PEREZ, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

MAID BRIGADE, INC., a Delaware Corporation, and BMJ LLC, a California Limited Liability Company,

Defendants.

Case No. C 07-3473 SI

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT BMJ LLC'S MOTION TO COMPEL ARBITRATION AND TO STAY PENDING LITIGATION

Date: October 12, 2007
Time: 9:00 a.m.
Dep't: 10

Assigned to Hon. Susan Illston

Alan Harris (SBN 146079)
David S. Harris (SBN 215224)
David Zelenski (SBN 231768)
HARRIS & RUBLE
5455 Wilshire Boulevard, Suite 1800
Los Angeles, California 90069
Telephone: (323) 931-3777
Facsimile: (323) 931-3366

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VIRGINIA PEREZ, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

MAID BRIGADE, INC., a Delaware Corporation, and BMJ LLC, a California Limited Liability Company,

Defendants.

Case No. C 07-3473 SI

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT BMJ LLC'S MOTION TO COMPEL ARBITRATION AND TO STAY PENDING LITIGATION

Date: October 12, 2007
Time: 9:00 a.m.
Dep't: 10

Assigned to Hon. Susan Illston

TABLE OF CONTENTS

TABLE OFAUTHORITIES

Cases

Statutes

I. Introduction.

This is a case in which Plaintiff seeks damages, statutory penalties, and restitution against two Defendants on her own behalf and on behalf a Class of like employees. One of the Defendants admits to having been Plaintiff's employer. That Defendant, BMJ LLC ("BMJ"), a California limited liability company, has moved to compel arbitration of all of Plaintiff's claims under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 3, 4. The other Defendant, Maid Brigade, Inc. ("MBI"), denies that it was ever an employer of Plaintiff. MBI has filed a limited statement of Non-Opposition to BMJ's Motion to Compel Arbitration. BMJ's Motion is premised upon an agreement to arbitrate that was purportedly signed by Plaintiff.

Plaintiff opposes BMJ's Motion on the following grounds: (1) The purported agreement, page number 60, in Exhibit B to the Declaration of Patrick M. Macias was not signed by her, (2) the purported agreement to arbitrate is unenforceable because it is both procedurally and substantively unconscionable, and (3) BMJ has not established that the purported agreement falls within the FAA.

II. Procedural Posture of the Case.

Plaintiff filed her Complaint on July 3, 2007. The Complaint alleges that Plaintiff was employed by BMJ and that her employment terminated on or about June 1, 2007. The Complaint also alleges that MBI is the franchisor of BMJ and that MBI is engaged in interstate commerce with annual sales in excess of $50,000,000 and with more than 1400 nationwide employees. It also alleges that MBI and BMJ, along with over 120 other franchisees, constitutes an "enterprise" within the meaning of the Fair Labor Standards Act ("FLSA").

The Complaint sets forth six causes of action, one of which—the fifth—asserts that Defendants have failed to pay minimum wages and have failed to pay overtime, all in violation of the FLSA. The other causes of action seek relief under California law. The first count, under California Labor Code section 1194, seeks both overtime and minimum-wage relief against BMJ only. Likewise, the second count, under California

Labor Code section 203, seeks continuing wages against BMJ only. Similarly, the third and fourth, under California Labor Code sections 226 and 226.7, seek damages against BMJ only for the failure to provide required information on pay stubs and for the failure to provide meal periods and rest periods. The sixth count, under California Business and Professions Code section 17200 *et seq.*, seeks restitution and injunctive relief against both BMJ and MBI.

MBI filed an Answer to the Complaint on August 10, 2007. MBI admits that it is engaged in interstate commerce, but it denies that it ever employed Plaintiff. (Ans. & Defenses of Def. Maid Brigade, Inc. ("MBI's Ans.") at 4:1—9.) MBI also denies that it is part of an enterprise within the meaning of the FLSA. (MBI's Ans. at 4:6-9.) MBI further alleges that Plaintiff has failed to exhaust her administrative remedies by failing to pursue a claim before the Labor Commissioner. (MBI's Ans. at 3:4–6.) BMJ filed an Answer on August 15, 2007. BMJ's Answer also alleges that Plaintiff has failed to exhaust administrative remedies by not making a claim before the Labor Commissioner. (Ans. & Defenses of Def. BMJ LLC ("BMJ's Ans.") at 3:6–9.) BMJ admits that it is a franchisee of MBI, alleges that it has insufficient information to admit or deny that MBI is engaged in interstate commerce, and denies that it is engaged in an "enterprise" with MBI. (BMJ's Ans. at 4:1–10.)

III. Summary of Evidence.

BMJ has filed the Declaration of Patrick M. Macias, one of its attorneys. In Paragraph 2 of the Declaration, Mr. Macias states:

> The substance of [Mr. Macias'] conversation with Mr. David Harris [one of Plaintiff's attorneys] was that [Mr. Macias'] office would be representing BMJ LLC in this matter, that [BMJ]'s files indicated that plaintiff Virginia Perez had signed an employment agreement with [BMJ] including a provision for arbitration of employment disputes, and that this matter should accordingly be referred to binding arbitration. A true copy of [Mr. Macias'] August 7 email to Mr. David Harris, with plaintiff's arbitration agreement as

an attachment is Exhibit A."

(Decl. of Patrick M. Macias in Supp. of Def. BMJ LLC's Mot. to Compel Arbitration & to Stay Pending Litig. ("Macias Decl.") ¶ 2.) In Paragraph 3, Mr. Macias states that he sent "a more complete set of documents plaintiff had signed in connection with her employment with [BMJ]" to Alan Harris, another attorney who represents Plaintiff. (Macias Decl. ¶ 3.) The email and its attachments are Exhibit B to the Macias Declaration. Exhibit B includes both the English and Spanish versions of the purported agreement to arbitrate, a non-compete agreement, a document in relation to uniforms, a document explaining the calculation of pay, and an acknowledgment of having received and read the employees handbook.

BMJ also filed the Declaration of Bruce Abbott, "the sole member of BMJ LLC." (Decl. of Bruce Abbott in Supp. of Def. BMJ LLC's Mot. to Compel Arbitration and to Stay Pending Litig. ("Abbott Decl.") ¶ 1.) Mr. Abbott states that he is the custodian of records for MBI and that Exhibit A to his Declaration is a true and correct copy of the employment agreement, with English translation, maintained in Plaintiff's personnel file at BMJ. (Abbott Decl. ¶ 2.)

Plaintiff has filed her own Declaration herewith in which she explains that she neither speaks nor reads English. (Decl. of Virginia Perez in Supp. of Opp'n to BMJ LLC's Mot. to Compel Arbitration & to Stay Pending Litig. ("Perez Decl.") ¶ 2.) Although her Declaration is in English, it was translated into Spanish for her by her husband and David Harris. (Perez Decl. ¶ 6.) She went to work for Maid Brigade in June 2002.[1] (Perez Decl. ¶ 3.) She signed some documents at that time, but they were not the ones that BMJ has furnished in support of its Motion. (Perez Decl. ¶ 5.) She has never heard of the American Arbitration Association, and she does not know what "arbitration" means. (Perez Decl. ¶ 4.) After she was injured while working at Maid Brigade, she was transferred to work in the office. (Perez Decl. ¶ 5.) Part of her responsibility involved

[1] All of the documents furnished by BMJ that appear to be signed by Plaintiff are dated December 20, 2002.

documents that employees would sign when they began working for the company. (Perez Decl. ¶ 5.) Those documents were different from Exhibits 1 and 2 to her Declaration. (Perez Decl. ¶ 5.)

IV. Argument.

A. BMJ Has Not Shown that Plaintiff Waived Her Right to Judicial Relief.

The document entitled "Alternative Dispute Resolution Agreement," although purportedly signed at the same time as other documents relating to Plaintiff's employment, is simply an agreement to submit all claims that Maid Brigade violated any of Plaintiff's legal rights to binding arbitration. The sole issue presented by BMJ's Motion to enforce the Alternative Dispute Resolution Agreement is the validity of the agreement. As such, this issue is one for this Court and not one for the arbitrator or arbitrators. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443–44 (2006).

BMJ has not produced any direct evidence that the signature on the Spanish-language version of the Employment Agreement is actually that of Plaintiff. Plaintiff declares that she does not recall signing the document and that she does not recall being presented with a thick package of documents such as Exhibits 1 and 2. (Perez Decl. ¶¶ 3, 5.) She has never seen documents such as those in Exhibits 1 and 2. (Perez Decl. ¶ 5.) She does not know what arbitration means. (Perez Decl. ¶ 4.)

It is significant that the documents in Exhibits 1 and 2, to the extent that they purport to bear the signature of Plaintiff, are all dated December 20, 2002, whereas Plaintiff declares that she entered BMJ's employment in June of that year. Because the Alternative Dispute Resolution Agreement was allegedly executed in California, this Court is to apply California law in determining its validity. Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101, 1105 (9th Cir. 2003) ("Circuit City Stores, Inc. I"). The California Civil Code, in sections applicable to *all* contracts, requires that there be consent that is free and mutual. Cal. Civ. Code § 1565. Obviously, there can be no consent if Plaintiff did not actually sign the Agreement. Furthermore, California Civil Code section 1577 provides that there is no consent where there is a mistake of fact not

caused by the neglect of a legal duty on the part of the person making the mistake. Id. § 1577. A mistake as to the nature of the document being signed is grounds for relief. Pac. State Bank v. Greene, 110 Cal. App. 4th 375, 388–89 (2003).

Accordingly, even if the purported signature of Plaintiff is genuine, the fact that she had no comprehension as to what arbitration meant and that she did not understand that it involved a waiver of significant rights would entitle her to relief. In any event, there is no evidence that she actually executed the document. (See Abbot Decl. ¶ 2 (stating only that Mr. Abbott is the custodian of records and not that he witnessed Ms. Perez sign the Agreement).)

B. The Agreement to Arbitrate Is Unconscionable.

On the issue of whether the Agreement is unenforceable because it is unconscionable, the Ninth Circuit has directed that the law of the state where the agreement was entered into is to be applied. In this case, the governing law is that of California. Ticknor v. Choice Hotels, Inc., 265 F.3d 931 (9th Cir. 2001); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 (9th Cir. 2002) ("Circuit City Stores, Inc. II"); Circuit City Stores, Inc. I, 335 F.3d at 1105.

Both Circuit City Stores, Inc. v. Adams and Circuit City Stores, Inc. v. Mantor acknowledge that the governing California authority on point is Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83 (2000). If an arbitration agreement is both procedurally and substantively unconscionable, then it is unenforceable.

Armendariz was a suit by two employees who claimed that they had been sexually harassed in violation of the Fair Employment and Housing Act ("FEHA") and that they had been wrongfully terminated from employment. Armendariz, 24 Cal. 4th at 90. Both employees had signed agreements that required them to submit any and all claims that they had to binding arbitration. Id. at 91. The trial court denied a motion to compel arbitration, but the Court of Appeals reversed. Id. at 92–93. The California Supreme Court reversed the Court of Appeals, determining that the agreement was unenforceable.

Id. at 127. In reaching that decision, the Court openly acknowledged that, under the FAA as well as under the California Arbitration Act, arbitration is a favored remedy. Id. at 96–98. Likewise, it found nothing to indicate that the arbitration of claims based on statutes such as the FEHA was forbidden. Id. If an adequate arbitral forum is provided, then a party does not, by agreeing to arbitrate, forego substantive rights. Id. at 98. Arbitration agreements that encompass unwaivable statutory rights must be subject to particular scrutiny. Id. at 100. An arbitration agreement cannot be the vehicle for waiver of the statutory rights created by FEHA. Id. at 101.

The Armendariz Court then turned to the specific shortcomings in the arbitration agreement before it—shortcomings that, when considered *in toto*, rendered it unenforceable. The agreement in question limited the scope of damages and attorney fees that could be recovered. Id. at 103, 104. It did not provide for discovery. Id. at 104. As the Court explained, a provision for adequate discovery is "indispensable" in arbitrating non-waivable statutory claims. Id. at 104. It was necessary that there be a written award and at least limited judicial review. Id. at 106. The employee must not be required to pay costs beyond those that would be incurred in filing a civil suit, i.e., provisions for the employee to pay all or part of the fees of the arbitrator are improper. Id. at 108–09. The Court explained:

> Accordingly, consistent with the majority of jurisdictions to consider this issue, we conclude that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court. This rule will ensure that employees bringing FEHA claims will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially imposed on an employee by the employer.

Id. at 110–11 (emphasis in original).

In addition, the agreement in Aremendariz required the employees to arbitrate their claims against the employer but imposed no such restriction on the employer. Id. at 116–17. This, too, was unconscionable. Id. at 117, 118.

When the California Legislature enacted the chapter of the Labor Code that includes section 203, it explicitly made the rights conferred by that chapter nonnegotiable. Livadas v. Bradshaw, 512 U.S. 107, 110 (1994); Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1111 (9th Cir. 1999). Accordingly, the arbitration agreement involved in this case is subject to the scrutiny mandated by Aremendariz.

Significantly, the agreement is exclusively one-way. It requires that the employee, if he or she believes that Maid Brigade has violated any of his or her rights arising out of employment, to submit to binding arbitration and not to file a lawsuit. It contains no such restriction on the employer. It clearly is a contract of adhesion, and because it was executed *after* the employment commenced, there is no consideration to support it.

The agreement to arbitrate explicitly includes all statutory claims (including those arising from off-duty conduct), all common-law claims (including tort and contract claims), and even workers' compensation claims.[2]

The Declaration of Alan Harris filed with this Memorandum authenticates the applicable rules of the American Arbitration Association ("AAA"). Exhibit 1 to the Declaration is a copy of the Labor Arbitration Rules; exhibit 2 is a copy of the Employment Arbitration Rules. The Labor Rules do not appear to contain any provisions for discovery. They provide that the arbitrator's compensation shall be borne equally by the parties. The Rules also provide for "Expedited Labor Arbitration Procedures." BMJ has not indicated whether it is seeking arbitration under the Employment Rules or the Labor Rules or, if it is seeking the latter, whether it seeks to utilize the expedited

[2] Labor Code section 5257 does permit limited arbitration of workers' compensation claims, but section 5270.5 establishes a list of eligible arbitrators, and it appears that the American Arbitration Association, which is designated as the arbitrator in the Agreement, is not eligible.

procedure that affirmatively requires that there be no stenographic record.

The Employment Arbitration Rules require that an employer intending to incorporate these rules or to refer to them in an employment ADR plan, at least thirty days prior to the effective date of the program, notify the AAA of the intent to do so and provide the AAA with a copy of the employment dispute-resolution plan. There is no indication whatsoever that BMJ has complied with this provision. Paragraph 12 provides that, if the arbitration agreement does not specify the number of arbitrators, there shall be a single arbitrator. Paragraph 9 vests the arbitrator with discretion to order discovery, but it confers no right to even minimal discovery. As to filing fees, the employee is required to pay a nonrefundable filing fee of $150, but administrative costs, unless otherwise agreed or ordered, are to be split evenly between the parties and may as high as $4,000 or $6,000.

The Agreement is unconscionable and unenforceable under the standards enunciated in Circuit City Stores, Inc. II. First, there is the obvious ambiguity as to which set of AAA rules applies, and there is no indication that BMJ ever furnished its employees with any information in that regard. If the Labor Rules apply, then there is no discovery and, possibly, no stenographic record. If the Employment Rules apply, then the availability of any discovery is committed entirely to the discretion of the arbitrator or arbitrators, and the administrative cost to the employee may reasonably be well in excess of $4,000.

Although it is not dispositive on the issue of enforceability of the agreement to arbitrate, it is noteworthy that the "package" of materials contained in Exhibit B to the Macias Declaration contains a covenant not to compete that forbids the employees—that is, the "maids"—from competing with Maid Brigade for a period of two years after leaving its employment. This offends against Business and Professions Code section 16600 *et seq.*, which section strictly limit agreements that restrain one from engaging in a lawful profession, trade, or business. VL Sys. v. Unisen, Inc., 152 Cal. App. 4th 708, 713 (2007). In fact, the entire "employment package" bespeaks a conscious intent to deprive

the employees of virtually every right and remedy. There is a pervasive aura of oppression and unconscionability.

Accordingly, even if this Court concludes that Plaintiff did execute the Alternative Dispute Resolution Agreement, it should decline to enforce it.

C. The Moving Defendant Has Not Demonstrated that the FAA Applies.

Title 9, section 2, United States Code, makes the FAA applicable to contracts "involving commerce." The effect of this requirement is that the FAA has the same reach as the commerce clause of the U.S. Constitution. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 274 (1995). The just-cited case involved a suit over the allegedly unsatisfactory performance of a termite-protection treatment rendered by a franchisee in Alabama, the franchisor being from outside Alabama. Id. at 268. In summarizing its holding, the Court said:

> The parties do not contest that the transaction in this case, in fact, involved interstate commerce. In addition to the multistate nature of Terminix and Allied-Bruce, the termite treating and house repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the Plan, came from outside Alabama.

Id. at 282.

In this case, the Complaint, in asserting that Defendants are subject to the FLSA, alleges that BMJ does business in Marin County, California, as a franchisee of MBI. It alleges that MBI and the local franchise, along with over one-hundred franchises located in over four-hundred "service areas" through the United States, constitute an "enterprise" within the meaning of the FLSA. It alleges that MBI is engaged in interstate commerce, with annual sales in excess of $50,000,000 and with more than 1400 employees nationwide.

BMJ's Answer admits that it is a franchisee of MBI, but the Answer also alleges that it does not know whether MBI is engaged in interstate commerce. It also denies that

it and MBI constitute an "enterprise" within the meaning of the FLSA. MBI's Answer admits that it is engaged in interstate commerce but denies that it and BMJ are an "enterprise" within the meaning of the FLSA. The allegations of each Defendant, in attempting to defeat the applicability of the FLSA, also undercut the applicability of the FAA.

At this point in this case, it appears that BMJ operates entirely within the State of California and, at least primarily, within Marin County. Whether or not any of the materials that BMJ supplies to its employees come from outside California is simply unknown. The franchisor, MBI, admits that it is engaged in interstate commerce, but that does not mean *per se* that the activities of its Marin County franchisee involve interstate commerce.

The franchisee, MBI, has filed a Statement of Non-Opposition to the Motion to Compel Arbitration but apparently objects to the scope of the proposed stay, believing that the case as between Plaintiff and MBI should go forward. Plaintiff is in agreement that the case against MBI should not be stayed, albeit for different reasons than those expressed by MBI.

BMJ has not offered any evidence as to whether the employment of Plaintiff (or of the unnamed Class Members) involved interstate commerce. Because it has not done so, it should be concluded that BMJ has failed to demonstrate the applicability of the FAA, and the Motion should be denied on that ground as well.

V. Conclusion.

Plaintiff respectfully submits that the Motion to Compel Arbitration should be denied on the bases that she did not sign the Alternative Dispute Resolution Agreement, that the Agreement is unconscionable, and that BMJ has not demonstrated that the FAA applies. In the event that the Court grants the Motion, it should direct that arbitration proceed as a class proceeding. See Gentry v. Superior Court, 2007 Cal. LEXIS 9376 (holding that, to the extent that an arbitration agreement prohibits class arbitrations, it is unenforceable).

DATED: September 21, 2007

HARRIS & RUBLE

/s/ Alan Harris
Alan Harris
Attorneys for Plaintiff

PROOF OF SERVICE

I am an attorney for Plaintiff herein, over the age of eighteen years, and not a party to the within action. My business address is Harris & Ruble, 5455 Wilshire Boulevard, Suite 1800, Los Angeles, California 90036. On September 21, 2007, I served the within document(s): **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT BMJ LLC'S MOTION TO COMPEL ARBITRATION AND TO STAY PENDING LITIGATION**.

I am readily familiar with the Firm's practice of collection and processing correspondence for mailing. Under that practice, the document(s) would be deposited with the U.S. Postal Service on that same day, with postage thereon fully prepaid, in the ordinary course of business, addressed as follows:

N/A.

I served the above document(s) via United States District Court Electronic Filing Service as set forth below:

Paul M. Macias
Sarah N. Leger
Ragghianti Freitas LLP
874 Fourth Street, Suite D
San Rafael, California 94901

James A. Bowles
E. Sean McLoughlin
One California Plaza
300 South Grand Avenue, Thirty-Seventh Floor
Los Angeles, California 90071

Daniel M. Shea
Paul R. Beshears
Michelle W. Johnson
Nelson Mullins Riley & Scarbourough LLP
999 Peachtree Street, Suite 1400
Atlanta, Georgia 30309

I declare under penalty of perjury that the above is true and correct. Executed on September 21, 2007, at Los Angeles, California.

/s/ David Zelenski
David Zelenski